

FILED 03/30/07

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

RONALD SANTOS,	)	Civil No. 05-1375-JE
	)	
Plaintiff,	)	FINDINGS AND
	)	RECOMMENDATION
v.	)	
	)	
JO ANNE B. BARNHART,	)	
Commissioner, Social Security	)	
Administration,	)	
	)	
Defendant.	)	
_____	)	

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JELDERKS, Magistrate Judge:

Plaintiff Ronald Santos brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of a final decision of the Commissioner of Social Security (the Commissioner) denying his claim for disability insurance benefits (DIB) under 42 U.S.C. §§ 401-33. The Commissioner's decision should be affirmed.

#### **PROCEDURAL BACKGROUND**

Plaintiff has filed several applications for benefits. His first application, which was denied on October 19, 1992, was never appealed.

Plaintiff's second application was filed on February 11, 1994. After that application was denied initially and on reconsideration, plaintiff timely requested a hearing before an Administrative Law Judge (ALJ). After a hearing, ALJ John Madden, Jr. issued a decision dated April 3, 1996, finding that plaintiff was not disabled within the meaning of the Social Security Act (the Act). In the present action, plaintiff does not contest that decision.

Plaintiff filed the application for DIB that is presently at issue on November 17, 1999. In that application, plaintiff alleged that he had been disabled since August 16, 1998, because of musculoskeletal disorders and problems of mental awareness. This application was denied initially on January 10, 2000, and was denied on reconsideration on April 5, 2000. Based upon plaintiff's timely request, a hearing was held before ALJ John Madden, Jr., on December 5, 2001. On February 8, 2002, ALJ Madden issued a decision finding that plaintiff was not disabled within the meaning of the Act because he could perform his past relevant work as an "odd-job worker." In the alternative, the ALJ found that plaintiff could perform other jobs that exist in substantial numbers in the national economy. That decision became the final decision of the Commissioner on June 2, 2002, when the Appeals Council denied plaintiff's request for review.

Plaintiff appealed the Commissioner's denial of his application for benefits to the United States District Court for the District of Oregon. In a Findings and Recommendation filed on November 7, 2003, the Honorable Magistrate Judge Janice Stewart found that the decision to deny the application for benefits was not supported by substantial evidence in the record. She recommended that the decision be reversed and that the action be remanded to the Agency for further proceedings. The Findings and Recommendation was referred to

the Honorable Anna Brown, who adopted it, reversed the Commissioner's decision, and remanded the action for further proceedings.

A third hearing was held before ALJ Madden, Jr. on March 8, 2005, in Bend, Oregon. Plaintiff, who was represented by counsel, and Eileen Linciocome, a Vocational Expert (VE), testified at the hearing.

In a decision dated May 23, 2005, ALJ Madden, Jr. again found that plaintiff was not disabled within the meaning of the Act because he retained the functional capacity required to work as a marking clerk, a seedling sorter, and a photocopy machine operator. That decision became the final decision of the Commissioner, and plaintiff appeals from the decision in the present action.

#### **FACTUAL BACKGROUND**

Plaintiff was born on April 12, 1952, and was 53 years old when the ALJ issued the latest decision denying his application for DIB. He earned a GED, and attended one year of college. Plaintiff has work experience as a piper liner, firefighter, flagger, gas station attendant, landscaper, and odd-job worker. He last worked in August, 1998, and his insured status expired on September 30, 1999.

Plaintiff is a Vietnam war veteran. At the time of the hearing, he testified that he received a 10% service-connected

pension from the Department of Veterans' Affairs (VA), based upon a hearing loss. Plaintiff has been denied service-connected benefits for which he applied based upon alleged back pain and Post Traumatic Stress Disorder (PTSD). At the time of the hearing, plaintiff testified that he used aspirin, Tylenol, and marijuana to treat his pain, but that he would not take prescription pain medications. Plaintiff has been arrested for cultivating marijuana, and was on probation for a time.

Plaintiff alleges that he is disabled by the following combination of impairments:

- chronic pain in the low back area;
- degenerative disk disease of the lumbar spine;
- failed back syndrome following two low back surgeries;
- status post L5-S1 diskectomy with fusion and placement of Steffe plates;
- residual bilateral leg pain;
- right leg cramping;
- difficulty standing;
- left knee failure which prevents plaintiff from walking;
- inability to stand for more than 15 minutes at a time;
- difficulty sitting for extended periods;
- need to frequently lie down;
- anxiety with obsessive features;

- psychogenic pain disorder;
- antisocial personality disorder;
- bilateral hearing loss; and
- right foot pain, numbness, and weakness.

#### **HEARING TESTIMONY**

At the hearing following the remand from the District Court, plaintiff testified that he experiences cramping, numbness, weakness, and pain in his right leg that makes it difficult for him to stand and walk. Plaintiff testified that his left knee frequently "goes out," that his back "goes out," and that he is unable to stand for more than 15 minutes at a time, has difficulty sitting for extended periods, needs to lie down frequently, and has hearing loss in both ears.

The ALJ posed a hypothetical describing an individual who could lift and engage in "push and pull activities" and lifting in the light work range, could stand 6 hours and sit 6 hours in an 8-hour workday, and could stoop and crouch occasionally. The ALJ found a moderate restriction in the ability to understand, remember, and carry out detailed instructions; work in proximity of others without being distracted; interact appropriately with the general public; get along with co-workers or peers without distracting them; and set realistic goals or plans independently of others. The VE testified that a person with these limitations could

perform work as a marking clerk, a seedling sorter, or a photocopy machine operator.

In response to questioning by plaintiff's counsel, the VE testified that an individual who needed to lie down 2 to 3 times during the day for a period of 2 to 15 minutes could not sustain competitive employment.

#### STANDARD OF REVIEW

A claimant is disabled if he or she is unable "to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The initial burden of proof rests upon the claimant to establish his or her disability. Roberts v. Shalala, 66 F.3d 179, 182 (9<sup>th</sup> Cir. 1995), cert. denied, 517 U.S. 1122 (1996). The Commissioner bears the burden of developing the record. DeLorme v. Sullivan, 924 F.2d 841, 849 (9<sup>th</sup> Cir. 1991).

The district court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record as a whole. 42 U.S.C. § 405(g); see also Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). "Substantial evidence means more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." Andrews, 53 F.3d at 1039. The court must weigh all of the evidence, whether it supports or detracts from the Commissioner's decision. Martinez v. Heckler, 807 F.2d 771, 772 (9<sup>th</sup> Cir. 1986). The Commissioner's decision must be upheld, however, even if "the evidence is susceptible to more than one rational interpretation." Andrews, 53 F.3d at 1039-40.

#### **DISABILITY ANALYSIS**

The ALJ engages in a five-step sequential inquiry to determine whether a claimant is disabled within the meaning of the Act. 20 C.F.R. §§ 404.1520, 416.920. Below is a summary of the five steps, which also are described in Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9<sup>th</sup> Cir. 1999).

Step One. The Commissioner determines whether the claimant is engaged in substantial gainful activity (SGA). A claimant engaged in such activity is not disabled. If the claimant is not engaged in substantial gainful activity, the Commissioner proceeds to evaluate the claimant's case under Step Two. 20 C.F.R. § 404.1520(b).

Step Two. The Commissioner determines whether the claimant has one or more severe impairments. A claimant who does not have such an impairment is not disabled. If the claimant has a severe impairment, the Commissioner proceeds to



evaluate claimant's case under Step Three. 20 C.F.R. § 404.1520(c).

Step Three. Disability cannot be based solely on a severe impairment; therefore, the Commissioner next determines whether the claimant's impairment "meets or equals" one of the impairments listed in the SSA regulations, 20 C.F.R. Part 404, Subpart P, Appendix 1. A claimant who has such an impairment is disabled. If the claimant's impairment does not meet or equal one listed in the regulations, the Commissioner's evaluation of the claimant's case proceeds under Step Four. 20 C.F.R. § 404.1520(d).

Step Four. The Commissioner determines whether the claimant is able to perform work he or she has done in the past. A claimant who can perform past relevant work is not disabled. If the claimant demonstrates he or she cannot do work performed in the past, the Commissioner's evaluation of the claimant's case proceeds under Step Five. 20 C.F.R. § 404.1520(e).

Step Five. The Commissioner determines whether the claimant is able to do any other work. A claimant who cannot perform other work is disabled. If the Commissioner finds that the claimant is able to do other work, the Commissioner must show that a significant number of jobs exist in the national economy that the claimant can do. The Commissioner may satisfy this burden through the testimony of a vocational

expert (VE) or by reference to the Medical-Vocational Guidelines, 20 C.F.R. Part 404, Subpart P, Appendix 2. If the Commissioner demonstrates that a significant number of jobs exist in the national economy that the claimant can do, the claimant is not disabled. If the Commissioner does not meet this burden, the claimant is disabled. 20 C.F.R. § 404.1520(f)(1).

At Steps One through Four, the burden of proof is on the claimant. Tackett, 180 F.3d at 1098. At Step Five, the burden shifts to the Commissioner to show that the claimant can perform jobs that exist in significant numbers in the national economy. Id.

#### **ALJ'S DECISION**

At the first step, the ALJ found that plaintiff had not engaged in substantial gainful activity since the alleged onset of disability.

At the second step, the ALJ found that plaintiff's degenerative disc disease of the lumbar spine and marijuana dependence were "severe" impairments within the meaning of 20 C.F.R. § 404.1520(c).

At the third step, the ALJ found that these impairments did not meet or medically equal an impairment in the "listings," Appendix 1, Subpart P, Regulation No. 4.

The ALJ found that plaintiff retained the functional capacity

for work in which he sits, stands, or walks for six hours total each in an eight-hour day; lifts 10 pounds frequently and 20 [pounds] occasionally; he can occasionally stoop or crouch; he is moderately limited in understanding, remembering, and carrying out detailed instructions; in working in coordination or proximity to others without being distracted by them; in interacting appropriately with the general public; in setting reasonable goals or independently planning, and in getting along with coworkers without distracting them or exhibiting behavioral extremes.

In assessing plaintiff's capacity, the ALJ found that plaintiff's allegations regarding his limitations were not wholly credible.

At the fourth step, the ALJ found that plaintiff could not perform any of his past relevant work.

At the fifth step, the ALJ found that, though plaintiff's exertional limitations did not allow him to perform the full range of light work, he could perform jobs that existed in substantial numbers in the national economy. The ALJ cited marking clerk, seedling sorter, and photocopy machine operator positions as examples of such jobs.

#### **DISCUSSION**

Plaintiff contends that the ALJ erred in failing to fully and fairly develop the record, in determining that his right foot condition was not severe, in failing to provide the required support for the conclusion that he was not wholly

credible, and in failing to properly address the statements of third party witnesses.

1. Development of the record

Plaintiff contends that the ALJ failed to fully develop the record concerning his "right foot and leg conditions" and associated symptoms that affect his ability to stand or sit, and in failing to further develop the record concerning his "pain disorder diagnosis" and the extent of his psychological impairments.

I disagree. Clearly, an ALJ has the duty to fully and fairly develop the record. See, e.g., Brown v. Heckler, 713 F.2d 441, 443 (9<sup>th</sup> Cir. 1983) (per curiam) (ALJ has "special duty" to fully, fairly develop record and to assure that claimant's interests are considered). However, an ALJ's duty to supplement the existing record arises only when the evidence is ambiguous or the record is inadequate to allow for proper evaluation of the evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001).

Here, the voluminous medical record included substantial information concerning the condition of plaintiff's right leg and foot, and provided ample evidence for evaluating the effect of impairments to that area on plaintiff's ability to sustain physical activity. The record likewise included sufficient evidence as to plaintiff's mental condition. The

severity of mental impairments is assessed according to the effect of the impairments on a claimant's ability to function. Section 12.00(C), Appendix 1, Subpart P, Regulations No. 4. The record here includes not only substantial evidence both as to the evaluation of plaintiff's mental condition, but as to the effect of plaintiff's psychological problems on his functional capacity. Though plaintiff disagrees with the ALJ's assessment of the severity of his right leg and foot problems and the ALJ's conclusion that plaintiff's marijuana dependence was his only severe psychological impairment, the medical record concerning those problems was adequate to allow for a proper evaluation of plaintiff's physical and mental problems. Accordingly, the ALJ did not err by not developing the record more fully.

2. ALJ's conclusion that plaintiff's right lower extremity problems are not "severe" impairments

Plaintiff contends that the ALJ erred in determining that problems with his right ankle and foot were not severe and in failing to consider workplace limitations that were caused by problems in that area. He asserts that the ALJ "ignored the history and prior determinations involving Plaintiff's right leg and foot even though those determinations were based upon permanent findings," and contends that the ALJ "simply chose to consider those parts of the record that supported the ALJ's

overall conclusion of denying Plaintiff's benefits."

Plaintiff contends that the ALJ "abused his discretion by repeatedly determining that the overall record did not support [plaintiff] when the [he] failed to evaluate the entire record."

A careful review of the ALJ's decision and the relevant medical record does not support these contentions. The ALJ did not ignore evidence concerning plaintiff's right leg and foot, but instead assessed the evidence concerning plaintiff's right leg and foot many times in his decision. The ALJ noted that Wayne Kelley, PAC, performed a VA examination on September 14, 2000, for musculoskeletal complaints, and observed that reflexes were "absent at the right ankle," and that "sensation was evidently diminished in the right foot." The ALJ noted that Kelley had reported that plaintiff was "able to stand on heels and toes," and had assessed plaintiff with "moderately diminished endurance and mild alterations in gait due to fatigue and spasm" in a report that was approved by Paul Matson, M.D. The ALJ noted that Gail Sheridan, FNP, examined plaintiff on January 9, 2003, and also found that plaintiff could "walk on heels and toes."

The ALJ further noted that James Nelson, M.D., who examined plaintiff on January 22, 2003, found an absence of right-ankle reflex, but also found that plaintiff retained a

"normal and non-ataxic gait," and that plaintiff's strength was intact.

In his decision, the ALJ observed that on August 1, 2003, plaintiff reported to a VA employee that he was active, and in "ok shape," except for his bad back. He also noted that, in a visit to Thomas Lucas, M.D., on March 4, 2004, plaintiff reported that he exercised and walked.

The ALJ also reviewed the findings of Delmar Greenleaf, M.D., who examined plaintiff on November 29, 2004. Dr. Greenleaf reported that plaintiff's strength in the lower extremities was intact, "as well as with dorsiflexion of the right and left ankles and great toes," and reported that plaintiff was able to stand on his toes. The ALJ also noted that Dr. Greenleaf reported "an absent reflex at the right ankle," and that Dr. Greenleaf concluded that plaintiff could stand eight hours in a day, "or for two hours at a time . . . ."

In addition to these more recent assessments, the ALJ reviewed earlier evidence in the record concerning plaintiff's leg strength and gait. He noted that, while Dr. Brennan had reported an ataxic gait and severe loss of strength in March 1994, "the bracketing examinations of Dr. Newby in 1993 and July 1994 found strength to be intact, and no gait abnormalities were reported." He also noted that, though Kelley had found plaintiff's leg strength "at 3/5 in September

2000 . . . as Dr. Lahman pointed out, such weakness would be enough to prevent the claimant from walking," and would be "at odds with the lack of atrophy shown by the claimant." The ALJ added that plaintiff's strength was "again intact" when plaintiff was examined by Dr. Nelson in 2003, and concluded that "the signs reported by Dr. Brennan and Mr. Kelley are very atypical," and that "any resulting conclusions of disability are not consistent with the overall record."

When the record includes contradictory evidence, the ALJ is required to resolve the conflicts, and the ALJ's conclusion regarding such evidence will be upheld if there is more than one rational conclusion. Allen v. Sec'y of Health & Human Servs., 726 F.2d 1470, 1473 (9th Cir. 1984). Here, the record included contradictory evidence as to the severity of the problems with plaintiff's right leg and foot. In evaluating plaintiff's right leg and foot problems, the ALJ did not ignore the relevant medical history or consider only the parts of the record that supported the conclusion that plaintiff did not have a severe impairment. In his decision, the ALJ considered the medical evidence that would support the conclusion that plaintiff had a severe impairment in this area, and considered the evidence that he did not. His conclusion that the medical problems with plaintiff's right leg and foot did not constitute a severe impairment was supported by substantial evidence in the medical record.



### 3. ALJ's credibility determination

Plaintiff contends that the ALJ erred in finding his description of the limitations caused by his problems with his right foot "unreliable" without providing "any reasons."

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). If a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony concerning the severity of symptoms merely because they are unsupported by objective medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998) citing Bunnell v. Sullivan, 947 F.2d 341, 343 (9<sup>th</sup> Cir. 1990) (*en banc*). Unless there is affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. Id., quoting Lester v. Chater, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

An ALJ rejecting a claimant's testimony may not simply provide "general findings," but instead must identify the testimony that is not credible and the evidence that undermines the claimant's complaints. Dodrill v. Shalala, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993). In addition, SSR 96-7 requires an ALJ to consider the entire record and to consider several factors, including the claimant's daily activities,

medications taken and their effectiveness, treatment other than medication, measures other than treatment used to relieve pain or other symptoms, and "any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms."

Plaintiff here produced medical evidence of an underlying impairment of his right foot and as to other impairments. Accordingly, the ALJ was required to provide clear and convincing reasons for rejecting plaintiff's testimony about the severity of his symptoms, and was required to identify the evidence that undermined plaintiff's testimony as to the effect of his impairments on his ability to function.

The ALJ satisfied this requirement. He noted the results of medical examinations which found that plaintiff had a normal gait, and cited substantial evidence that plaintiff exaggerated his symptoms. The ALJ noted that, in addition to finding that plaintiff's strength and sensation tests were invalid, Dr. Greenleaf "found that he had positive Waddell's signs for overdramization [sic] of symptoms," and reported that plaintiff showed greater movement in his neck when he was out of the examining room than he had when he was being tested. As evidence of exaggeration, the ALJ also cited plaintiff's testimony that he has "massive" nerve damage in his back and legs, though there is no medical evidence supporting that assertion. He noted that, though plaintiff

testified that his back and knee pain were so great that he could not walk and that his neck pain was so extreme that he could not use his arms, Dr. Greenleaf reported that plaintiff had calluses on his hands. The ALJ cited plaintiff's "admitted level of activity," and concluded that this activity was "inconsistent with his allegations of crippling symptoms." He noted that plaintiff had told Dr. Bellville of a "wide range of activities" in which he participated after the alleged date of his onset of disability. These included riding a mountain bike, shopping, performing basic cleaning, paying bills, going on walks, doing beadwork and leather work, and writing poetry. The ALJ noted that plaintiff had performed jobs such as working as a flagger for several months, "despite the need to stand up to 12 hours a day," and cited plaintiff's statement to the VA that he survived, in part, through performing odd jobs. He noted that plaintiff stated that he had built a cabin, that he had cared for several children, that he had described himself as "active," and that he had reported looking for rocks and taking his children fishing several times "despite allegedly being unable to walk many days, or to raise his hands." The ALJ also noted that Frank Lahman, Ph.D., a reviewing psychologist, concluded that plaintiff overstated his limitations.

These are clear and convincing reasons, supported by the record, for concluding that plaintiff's testimony about the

effects of his impairments, including his right leg impairment, was not wholly credible.

#### 4. Other lay witness evidence

Plaintiff contends that the ALJ erred in failing to properly address the lay witness statement of Richard Gorby, a Veterans Representative. In her Findings and Recommendation, Magistrate Judge Stewart noted that Gorby had stated that plaintiff had behavioral problems that interfered with his ability to work on a regular basis. In the space following his "yes" response to a question asking whether plaintiff had such behavioral problems, Gorby added the notation "totally screwed up." Magistrate Judge Stewart noted that the ALJ had failed to address Gorby's observation in his decision denying plaintiff's application for disability benefits.

In his present decision, the ALJ did not address in depth Gorby's statement that plaintiff's behavior would interfere with his ability to work on a regular basis, or his brief explanatory notation that plaintiff was "totally screwed up." He likewise did not directly address Gorby's opinion that plaintiff did not get along with his employer, which was followed by his notation that plaintiff was "hard to get along with." Instead, the ALJ simply stated that, because plaintiff was "shown to be able to perform a reduced range of light work, he could not be found to be credible," and added that

"[a]s the claimant himself has poor credibility, and for the same reasons, any allegation by third parties implying disability such as that in [the form Gorby completed] must also be discounted."

An ALJ "must give reasons that are germane" for rejecting the statements of a lay witness. Dodrill v. Shalala, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993). Here, to the extent that Gorby's answers on the form he completed might imply that plaintiff is disabled, the ALJ rejected Gorby's statements "for the same reasons" that he found that plaintiff was not wholly credible. Those reasons, as noted above, included plaintiff's ability to engage in activities that were inconsistent with the conclusion that his limitations were disabling.

The ALJ's discussion of his reasons for discounting Gorby's statements was very brief, and a fuller explanation might have been helpful. However, this action need not be remanded for further explanation of the ALJ's reasoning in this regard for two reasons. First, Gorby's statements appeared to primarily address plaintiff's mental problems, including ability to get along with others. These are limitations that the ALJ largely accepted in a residual functional capacity assessment that noted moderate limitations in ability to understand, remember, and carry out detailed instructions, and moderate limitations in the ability to work with others and in interacting with the public. Second, to

the extent Gorby's statements may have implied greater limitations, those were inconsistent with plaintiff's activities, which the ALJ discussed in finding that plaintiff's own testimony was not wholly credible.

#### CONCLUSION


For the reasons set out above, the Commissioner's decision denying plaintiff's request for disability benefits should be AFFIRMED, and a judgment should be entered dismissing this action with prejudice.

#### SCHEDULING ORDER

The above Findings and Recommendation are referred to a United States District Judge for review. Objections, if any, are due April 16, 2007. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

A party may respond to another party's objections within 10 days after service of a copy of the objection. If objections are filed, review of the Findings and Recommendation will go under advisement upon receipt of the response, or the latest date for filing a response.

DATED this 30 day of March, 2007.

  
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John Jelderks  
U.S. Magistrate Judge